IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78-206

No. Misc.

JOHN C. NUNLEY,

Petitioner,

—against—

DANIEL GUIDO, COMMISSIONER OF POLICE OF THE COUNTY OF NASSAU,

Respondent,

Reviewing the Determination of the Respondent in Dismissing Petitioner, John C. Nunley, from the Police Department, County of Nassau.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

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To: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

The petitioner, John C. Nunley, prays that a writ of certiorari issue to review the order of the New York State Supreme Court, Appellate Division, Second Department, which affirmed a judgment of conviction rendered in a disciplinary proceeding held by the Nassau County, New York Police Department, rendered July 6, 1977, convicting petitioner after a hearing of a violation of Police Department Rules and Regulations and sentencing him to a discharge from the Police Department.

Opinions Below

The opinion of the New York State Supreme Court, Appellate Division, Second Department, as yet unreported, is attached hereto. Leave to appeal to the New York Court of Appeals was denied on June 3, 1978 (see Order Denying Leave, attached hereto).

Jurisdiction

The Order of the New York State Court of Appeals Denying Leave to Appeal to that court was denied on June 8, 1978.

Jurisdiction is conferred under 28 U S C 1257.

Question Presented

Whether petitioner's right to be represented by the attorney of his choice and whether petitioner's right of an opportunity to defend himself were violated.

Constitutional Provisions and Statutes Involved

This case involves the Sixth Amendment to the United States Constitution.

Statement of the Case

That on or about the *14th day of January, 1972,* petitioner was appointed a patrolman with the Police Department of the County of Nassau, State of New York.

On or about the 6th day of January, 1977, petitioner was served with police department charges that:

> "1. Police officer John C. Nunley, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York, engaged in unlawful conduct, in that, police officer Nunley did, without justification, fire a loaded gun at a cigarette machine, thereby *recklessly endangering* other people who were present in and about Mother's East Pub.
>
> 2. Police officer John C. Nunley, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York, engage in unlawful conduct, in that, police officer Nunley, having no legal right to do so, nor any reasonable ground to believe he had such right, *intentionally* damaged the property of another person when discharged a loaded firearm into a cigarette machine.
>
> 3. Police officer John C. Nunley, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville

Road, Bethpage, New York, fail to exercise the utmost care in the handling of a firearm, in that, police officer Nunley unjustifiably displayed a loaded firearm in a tavern with others present and discharged said loaded firearm into a cigarette vending machine.

4. Police officer John C. Nunley, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York, while not lawfully hunting or target shooting, fail to report as soon as practicable to the Commissioner of Police, through official channels, that he had discharged two shots from a loaded firearm into a cigarette vending machine while present at a bar in Bethpage, New York.

5. Police officer John C. Nunley, did, between 2000 and 2300 hours, December 5, 1976, in the vicinity of Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York, while off duty and not in uniform, fail to carry .38 special caliber departmental issue cartridges in his firearm, in that, police officer Nunley's firearm was loaded with what is commonly referred to as "jacketed" cartridges, which when fired create a dual hazard, in that, the jacket may separate from the bullet in flight with the result that two prejectiles are present instead of one.

6. Police officer John C. Nunley, did, at, on, or about 1200 hours, December 6, 1976, in the vicinity of Nassau County Police Department Headquarters, Room 254, 1490 Franklin Avenue, Mineola, New York, orally make false official communciations to Deputy Chief Inspector James A. Henderson and

Sergeant Robert G. Ledford, in that, police officer Nunley denied discharging a loaded firearm into a cigarette vending machine on December 5, 1976, between 2000 and 2300 hours, at Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York.

7. Police officer John C. Nunley, did, at, on, or about 1200 hours, December 6, 1976, in the vicinity of Nassau County Police Department Headquarters, Room 254, 1490 Franklin Avenue, Mineola, New York, make and submit a false official statement in writing, in that, police officer Nunley denied discharging a loaded firearm, into a cigarette vending machine on December 5, 1976, between 2000 and 2300 hours, at Mother's East Side Pub, 579B Hicksville Road, Bethpage, New York."

That on or about June 14, 1977, and June 17, 1977, a disciplinary hearing of said charges and specification, was held and on July 6, 1977, petitioner, was found guilty of violating Specifiation Numbers, One, Two, Three, Four, Five, Six and Seven, to wit: Specification Number One violating Article 6, Rules 6, Subdivision 14, Specification Number Two, violating Article 6, Rule 9, Subdivision 14; Specification Number Three violating Article 6, Rules 22, Subdivision A; Specification Number Four violating Article 6, Rule 22, Subdivision B; Specification Number Five violating Article 8, Rules 12; Specification Number Six violating Article 6, Rule 9, Subdivision 12; and Specification Number Seven violating Article 6, Rule 9, Subdivision 12 of the Rules and Regulations, Police Department, County of Nassau, New York and as a result thereof, the petitioner was dismissed from the Police Department, County of Nassau.

On July 15, 1977, a proceeding was brought pursuant to Article 78 of the Civil Practice Law and Rules, of the

State of New York and was transferred for disposition on September 1, 1977, by order of the Hon. Paul Kelly, J.S.C., to the Appellate Division, Second Judicial Department.

REASONS FOR GRANTING THE WRIT

Under the facts and circumstances of this case, the determination and orders made by the Commissioner of Police dismissing the petitioner were unfair, unreasonable, unnecessary, and illegal that petitioner was not afforded a fair hearing because he did not have counsel of his choice, and was in effect, denied the right to testify and represent witnesses in his own behalf.

It is respectfully contended by the petitioner herein that serious errors of law were committed by the Trial Commissioner which precluded petitioner from having a fair hearing. It is submitted that by denying the petitioner a further adjournment in this case, petitioner was denied the right to be represented by counsel of his own choice and that, in effect, he was denied a right to testify and present witnesses in his own behalf.

The courts of New York State have held that the evidence in support of an administrative determination, in the light of the record as a whole, must satisfy a reasonable mind: *Kopec* v. *Buffalo Broke Beam-Acme Steel and Malleable Iron Works*, 304 N.Y. 65; *Phinn* v. *Kross*, 8 App. Div. (2) 132. Also appropriate are the words of Mr. Justice Frankfurter in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S., where he indicated the the substantiality of evidence must take into account whatever in the record fairly detracts from its weight.

Before the Hearing Officer can effectively determine the guilt or innocence of an individual subjected to an administrative hearing the accused, thus must have an ample opportunity to develop his case. We submit that in the case at bar this was not so.

At this point, a brief history of the chronology of events might be helpful to the Court. Police officer Nunley was arraigned on the aforementioned charges and specifications on January 10, 1977 (see record) and a trial date was set for January 12, 1977. On January 12, a request for an adjournment was made and granted and the matter was set down to March 8, 1977. for a hearing. At that time, police officer Nunley acknowledged compliance with Section 75 of the Civil Service Law in that he consented to suspension without pay after thirty day limit of the statute. On March 8, the case was adjourned to May 2, 1977. On May 2, (p. 6 of transcript hearing that date) it was acknowledged by the Hearing Officer that appellant's attorneys herein, were not the attorneys for police office Nunley in a related, pending criminal matter and that the attorney for that criminal matter was actually engaged. That matter was then put over to May 23.

On May 23, 1977, another adjournment was made because the pending criminal matter had to be heard (p. 3), and at that time the Hearing Officer determined that unless Mr. Nunley was on trial in the criminal case, the hearing would be conducted on June 14, 1977. The respondent's attorney did not object to the adjournment.

On June 14, 1977, a further request was made for an adjournment, and this request was denied and the appellant was forced to proceed to trial. However, on that date, appellant's attorneys now bringing this appeal notified the Hearing Officer that the appellant's attorney from the criminal case wished to make an official appearance

(p. 5) and a request was made by the first attorneys to be substituted by the attorney handling the criminal matter since he was best acquainted with the issues in question (p. 7). In fact, the Hearing Officer was notified that the criminal case was set for June 27, 1977, and that the Court therein had marked the case final against Mr. Nunley (p. 6). At that point, the hearing was begun, under protest (p. 7) but the attorney consented to proceed and represent Mr. Nunley for purposes of hearing the police department's case and then requested a continuance at the close of the respondent's case so that the appellant's criminal attorney could come in and represent Mr. Nunley in his defense (p. 7 and p. 133). The Hearing Officer was notified by the last attorney handling the case, who represented the PBA, that no effort had been made to prepare a defense (p. 10) because they assumed that the other attorney would handle the presentation of the defense. In fact, the PBA attorney notified the Hearing Officer that Mr. Nunley's criminal attorney had directed him not to proceed (p. 149) because it would affect the pending criminal matter. At the close of the department's case, the hearing was continued for three days to June 17, 1977, for the criminal attorney to appear.

On June 17, 1977, a further application for a continuance was made so that the appellant, police officer Nunley could conclude his criminal matter, and then be free to testify in the hearing (p. 154). It was argued that by denying a continuance, the appellant was in effect forced not to testify (p. 155).

The attorney handling the criminal matter also made an appearance on June 17, 1977, and notified the Hearing Examiner that he wished to substitute for the PBA attorney (p. 159) but that he was actually engaged in a criminal matter and could not proceed at that particular point.

He further gave reasons for the delay in the criminal case. He cited the fact that superseding charges had been filed after the initial arraignment, that motions had been made and that the determination on the motions had taken considerable time before finally being rendered and that Mr. Nunley was under a doctor's care and that it took some time for the doctor to complete his medical examination. The criminal attorney further explained (p. 161) that because of the pending criminal case, he could not permit his client to testify because anything that he testified to in the hearing could be used against him in the criminal case and that the police department could not grant Mr. Nunley immunity for testifying at the Police Disciplinary Hearing.

Nevertheless, the Hearing Examiner directed the PBA attorney to proceed and the hearing was further conducted under protest (p. 165). It was then explained that there were three witnesses that were to be called (p. 168 and p. 169) but because another attorney was handling the case, these witnesses had not been contacted and were thus not available. Explanations were made on the record once again that officer Nunley would not testify and that his defense did not rest but was forced to conclude (p. 183). The hearing was thus closed.

The appellant thus contends that any deprivation of the right to counsel and thus to a fair trial, in itself, is a basis for annulment of a determination resulting therefrom. *Romeo* v. *Union Free School District No. 3, Town of Islip,* 368 N.Y.S. 2nd 726. The right to have the assistance of counsel is to fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. *Glazer* v. *U.S.,* 315 U.S. 60.

It is well settled, therefore, that an individual has a right to the counsel of his own choice, *People* v. *Price,*

262 N.Y. 410, and that this right to counsel applies to disciplinary proceedings as well as to criminal actions, *Fusco* v. *Moses,* 304 N.Y. 402. That case further raised the issue that a question to be determined in an Article 78 proceeding is "whether, in making a determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the petitioner". The appellant contends that the denial of this right of counsel and denial of further adjournment, had denied Mr. Nunley the right to fair hearing. "The hearing held by an administrative tribunal acting in a judicial or quasi-judicial capacity may be more or less informal. Technical legal rules of evidence and procedure may be disregarded. Nevertheless, no essential element of a fair trial can be dispensed with unless waived. That means, among other things, that the party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." (*Hecht* v. *Monaghan,* 307 N.Y. 461, 470, 121 N.E. 2nd 421, 425). It should be borne in mind by Hearing Examiners in governmental agencies that they are acting in quasi-judicial capacities; that there is imposed upon them an obligation to afford all who come before them a fair opportunity to be prepared to meet the issues and to produce witnesses on their own behalf. This constitutional right must not be circumvented. *O'Dea's Bar & Rest., Inc.* v. *New York State Liq. Auth.,* cite as 201 N.Y. S. 2d 340 at 343.

Therefore, the necessity of delegating judicial functions of government to administrative bodies cannot be allowed to overcome the most basic rights afforded to individual citizens including the right to a full and fair hearing. *Louis Irwin* v. *Board of Regents,* 279 N.Y.S. 2d 69 (1967) at 72.

POINT II

The punishment imposed is so disproportionate to the offense, in light of all the circumstances, so as to be shoking to one's sense of fairness.

It is respectfully submitted by petitioner that even if this Court determines that respondent was correct in finding petitioner guilty, the punishment was excessive, arbitrary, and capricious, predetermined and should therefore be overturned.

CONCLUSION

Petitioner prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

RICHARD HARTMAN
Attorney for Petitioner
300 Old Country Road
Mineola, New York 11501

Of Counsel:

MICHAEL C. AXELROD

[APPENDIX FOLLOWS]

APPENDIX

Opinion and Order of the Supreme Court of the State of New York Appellate Division Second Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 3, 1978

HON. HENRY J. LATHAM,
Justice Presiding,
HON. VINCENT D. DAMIANI,
HON. JOSEPH F. HAWKINS,
HON. FRANK D. O'CONNOR,
Associate Justices.

In the Matter

of

JOHN C. NUNLEY,

Petitioner,

v.

DANIEL GUIDO, Commissioner of Police of the County of Nassau,

Respondent.

The above named John C. Nunley, petitioner, having instituted this proceeding pursuant to CPLR article 78,

Opinion and Order of the Supreme Court of the State of New York Appellate Division Second Department

by a petition verified July 15, 1977, to review respondent's determination, dated July 6, 1977, which, after a hearing, adjudged petitioner guilty of certain charges of misconduct and dismissed him from his position as a police officer; the respondent having filed an answer thereto; by order of the Supreme Court, Nassau County, dated September 29, 1977, the proceeding was transferred to this court for determination; and the proceeding having been submitted by Messrs. Hartman, Morganstern & Lerner, Esqs., of counsel for the petitioner and submitted by Natale C. Tedone, Esq., of counsel for the respondent, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is unanimously

ORDERED that the determination is hereby confirmed and the proceeding dismissed on the merits, without costs or disbursements.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Order of the Court of Appeals of the State of New York Denying Motion for Leave to Appeal

STATE OF NEW YORK
COURT OF APPEALS

At at session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of June A. D. 1978

Present:

HON. CHARLES D. BREITEL,
Chief Judge, presiding.

2 Mo. No. 477

In the Matter of the

Application of JOHN C. NUNLEY,

Appellant,

For an Order &c.,

vs.

DANIEL GUIDO, Commissioner of Police of the County of Nassau,

Respondent,

Review the determination of the Respondent in dismissing the Petitioner &c.

Order of the Court of Appeals of the State of New York Denying Motion for Leave to Appeal

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

JOSEPH W. BELLACOSA
Clerk of the Court